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December 12, 2005

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Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
c/o Natek, Inc.  
236 Massachusetts Avenue, N.E. - #110  
Washington, DC 20002

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DEC 12 2005

Federal Communications Commission  
Office of Secretary

Re: ET Docket 04-295, RM 10865

Dear Ms. Dortch:

On behalf of SMITCOMS, Inc., I enclose an original and four copies of its Reply Comments in the above-captioned proceeding, along with an additional File Copy to be stamped and returned to this office.

Please contact the undersigned in the event there are questions regarding this filing or these documents.

Sincerely,



Andrea M. Barbarin

cc: Managing Director, SMITCOMS  
Curtis T. White, Esq.

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

DEC 12 2005  
Federal Communications Commission  
Office of Secretary

In the Matter of	)	
	)	
Communications Assistance for	)	ET Docket No. 04-295
Law Enforcement Act and	)	
Broadband Access and Services	)	RM 10865
_____	)	

REPLY COMMENTS OF SMITCOMS, INC.

Sint Maarten International Telecommunications Services, Inc. (SMITCOMS), through counsel and pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, hereby submits its Initial Comments in response to the Commission's Order of September 23, 2005,<sup>1</sup> which expands the applicability of the Communications Assistance for Law Enforcement Act (CALEA) to additional services and carriers. It offers as follows:

1. The Present Operation of SMITCOMS Does Not Subject it to CALEA

SMITCOMS previously described its current operation in the two U.S. markets where it is directly connected by its SMPR-1 submarine cable system.<sup>2</sup> In doing so, it stated that it is a small telecommunications carrier focused on providing connectivity for global and regional telecommunications carriers on its SMPR-1 cable network. It stated further that, in its present mode of operation in the U.S., its services are limited to transport of traffic for its carrier customers into gateway points.

<sup>1</sup> *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-295, FCC 05-153 (rel. Sept. 23, 2005) [hereinafter *First Report and Order*].

<sup>2</sup> As noted in its *Initial Comments*, SMITCOMS has licensed Landing Stations in San Juan, PR and Sint Maarten, Netherlands Antilles; it also as IRU connectivity in the NAP in Miami, FL.

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It then noted that the Commission's expanded framework for CALEA applicability set out the following elements, to wit: (1) facilities-based providers of any type of broadband Internet service; (2) "managed" VoIP services; (3) whether the wire or electronic communications switching or transmission is a replacement for a substantial portion of the local telephone exchange (SRP); and (4) whether it is in the public interest to deem such an entity a telecommunications carrier. It was based on that definitional framework that SMITCOMS concluded its present operation – that of only provisioning carrier transport to the hereinbefore gateways – did not subject it to CALEA.<sup>3</sup>

Beyond its current operation, SMITCOMS also noted it was recently issued a license by the Telecommunications Regulatory Board of Puerto Rico to land and operate switching facilities in the local loop, and that said license authorizes it provide VoIP as well as leased-line services.<sup>4</sup> It posited therein that the mere placement of switching facilities in the local loop to provide backhaul transport for carrier customers – even though the transited traffic would include VoIP and other internet data – did not or should not subject it to CALEA obligations.<sup>5</sup> Moreover, to the extent it was determined that its placement of switching facilities in the local loop subjected it to CALEA, even though it would merely be providing carrier transport for local loop (subscriber) operators, it submitted it should be granted exemption from CALEA.

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<sup>3</sup> See SMITCOMS Initial Comments at 3-4.

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 4.

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In observing that the FCC correctly concluded that Section 102(8)(c)(ii) of CALEA authorizes it to grant exemptions, it then proffered a well-defined rationale (using the language from DOJ) for granting it exemption from CALEA. In doing so, it set-out at least four categories or areas of consideration under which, it submitted, exemption could be granted, viz: (i) a well-defined class of small carriers; (ii) based upon the nature of its telecommunications business (i.e., carrier's carrier simply providing transport for local loop providers) should be granted exemption; (iii) a small carrier's carrier without market power (as defined by the Commission) should be granted exemption; and (iv) for other reasons found to be consistent with or otherwise dictated by the public interest.<sup>6</sup>

2. Comments by the Department of Justice Should Not be Read to Extend CALEA Obligations to SMITCOMS

The Department of Justice (DOJ) generally supports the Commission's decision to expand the reach of CALEA, but also calls for further expansion of the framework to protect safety and security. In doing so, it proposes that CALEA be extended to VoIP services that allow one to *place calls to or receive calls from* the PSTN, *i.e.*, eliminate the requirement that the network must both permit calls to *and* the receipt from the PSTN, and substitute a rule that extends CALEA when *either* a customer or end-user is permitted to *receive or place* a call to the PSTN.<sup>7</sup>

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<sup>6</sup> *Id.* at 6.

<sup>7</sup> DOJ Comments at 4.

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Additionally, DOJ suggests that the expanded framework should not be limited to VoIP services that require a broadband connection.<sup>8</sup> Finally, while DOJ agrees with the Commission's determination that "Interconnected VoIP" requiring IP-Compatible Customer Premises Equipment (CPE) should be covered, it argues that equipment compatibility is "not relevant to CALEA's applicability under the SRP."<sup>9</sup> Although SMITCOMS would be directly affected if the Commission were to follow DOJ's CALEA-expansion suggestions, it maintains that it would continue to be exempt even using the expanded framework posited by DOJ in its Comments.

SMITCOMS has clearly established it is a small telecommunications carrier by any standard, and will have a very limited interface in the local loop to the extent it establishes co-lo facilities in the Puerto Rico market. Its initial provisioning will be focused on its carrier customer base and in the leasing of lines to prospective customers that require "fat-pipe" broadband capacity for voice and data traffic. All of these customers are, in the first instance, subject to CALEA and, thus, law enforcement has direct "capacity" and "capability" to all end-users. To require some further obligation for carriers such as SMITCOMS – where it is simply transporting traffic of an entity already subject to CALEA – is, we submit, both unnecessary and unwarranted.<sup>10</sup>

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<sup>8</sup> DOJ Comments at 7.

<sup>9</sup> *Id.* at 8.

<sup>10</sup> As suggested by other commenters, there is some question whether law enforcement is able to identify or otherwise extract useful data from a broadband facility carrying batched traffic belonging to various carriers providing local loop services.

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DOJ states it is amenable to evaluating CALEA exemption proposals that set out well-defined categories of providers and/or services, the class of users where applicable, and the measures the providers propose to take to address public safety and national security interests.<sup>11</sup>

In response, SMITCOMS again submits that it has clearly defined categories of providers and services for which it urges exemption. It has not previously nor does it now offer comment on a class of users for which exemption should be considered. However, SMITCOMS does reaffirm its agreement with the general premise that law enforcement should be permitted to engage in electronic surveillance to protect security and safety. Indeed, under the expanded framework set out in the Commission's Order, all of SMITCOMS carrier customers are subject to CALEA and, as such, that application guarantees law enforcement will have the access it proposed. Notwithstanding, SMITCOMS does have a plan to further address public safety and national security interests to the extent it is granted exemption. More specifically, and in the event it is subsequently determined that substantial amounts of local-loop traffic is somehow bypassing telecommunications carriers now subject to CALEA obligations, SMITCOMS would urge law enforcement to do as it has done in the instant proceeding – request that the Commission further expand applicability of CALEA in view of additional advances in technology, thereby affording all affected parties an opportunity to be heard

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<sup>11</sup> DOJ Comments at 12.

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and the FCC with record evidence upon which to fashion a decision consistent with the public interest standard.<sup>12</sup>

### 3. The Position Opposing CALEA Exemptions Must be Disregarded

Contrary to the rational position of both the Commission and law enforcement, various parties suggest that exemptions should not be granted. The positions they assert are without merit.<sup>13</sup> Moreover, as SMITCOMS has determined (preliminarily) that its cost for ensuring CALEA compliance will constitute an undue economic hardship, such a position contravenes the Regulatory Flexibility Act.

As for the method by which exemptions are determined, SMITCOMS supports the creation of exempt classes rather than exemptions made on a case-by-case basis as some commenters have suggested. To do so would permit carriers to make business decisions and projections based on stable, firmly established requirements rather than endure unpredictable outcomes – a consideration particularly important for smaller carriers with restricted resources.

Finally, in the event the Commission does not exempt SMITCOMS from CALEA obligations, it urges that the compliance period be extended.

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<sup>12</sup> Such a proceeding, of course, could be placed on an expedited schedule as circumstances may dictate.

<sup>13</sup> The parties opposing exemption seem to take the view that, perhaps, they are more knowledgeable about law enforcement matters and criminals than law enforcement agencies. However, they offer no evidence or expertise to support such a presumption. Rather, their statements are merely unfounded assumptions about what a potential criminal may or may not do, and provide no factual data upon which the FCC may base a conclusion.

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Conclusion

For all of the foregoing reasons, SMITCOMS urges the Commission to reaffirm that its present mode of operation is exempt from CALEA, and that its authorized and proposed extension into the local loop – as a carriers' carrier – does not subject it to CALEA obligations.

Respectfully submitted,

SMITCOMS, INC

By: \_\_\_\_\_



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